Supreme Court, U.S.
FILED
APR 21 1999
CLERK

No. 98-1511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF AUBURN, a municipal corporation of the State of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation; BURLINGTON NORTHERN SANTA FE ACQUISITION, INC. and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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258

TABLE OF CONTENTS

	Page
Interest of *Amici Curiae*	1
Table of Cited Authorities	ii
Summary of Argument	2
Argument	3
I. The ICCTA Is Not Clear And Unambiguous As To The Intent Of Congress To Preempt All State Police Powers With Respect To Railroads. . .	3
II. The Legislative History Of The ICCTA Mandates A Finding That Congress Did Not Intend To Sweep Away Local Police Powers As They Apply To Railroads.	12
III. Important Questions Of Federalism Are Presented By This Case. The Court Ought To Grant Certiorari To Return Balance To The Relationship Between Railroads And The States Caused By The Ninth Circuit Misreading Of Congressional Intent.	18
Conclusion	20

TABLE OF CITED AUTHORITIES

Cases: *Page*

Borough of Riverdale v. New York Susquehanna and Western Railway Corp., New Jersey, Law Division, Morris County, not officially reported, Docket No. MRS-L-2297-96 (decided August 7, 1996) 6

Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288 (D.Mt. 1997) 13, 15

CSX Transp., Inc. v. City of Plymouth, Mich., 86 F.3d 626 (6th Cir. 1996) 13

CSX Transp., Inc. v. Georgia Pacific Public Service Comm'n., 944 F. Supp. 1573 (N.D. Ga. 1996) ... 14, 15

Illinois Commerce Commission v. I.C.C., 879 F.2d 917 (D.C. Cir. 1989) 13

I.N.S. v. National Center for Immigrants' Rights, 502 U.S. 183, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991) 12

Medtronic v. Lohr, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) 5, 7, 8, 12

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959) . 19

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 797 (1974) 19

Cited Authorities

	Page
Village of Euclid v. Ambler, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 2d 303 (1926)	19
Village of Ridgefield Park v. New York Susquehanna and Western Railway, 318 N.J. Super 385, 72 A.2d 267 (App. Div. 1999)	6
Statutes:	
16 U.S.C. § 1531	12
33 U.S.C. § 1251	12
42 U.S.C. § 4321 *et seq.*	3, 12
42 U.S.C. § 7401	12
49 U.S.C. § 10103	15, 17
49 U.S.C. § 10301	16, 17
49 U.S.C. § 10501	10, 13, 17
49 U.S.C. § 10501(b)	8, 10, 14, 15, 16, 17
49 U.S.C. § 10501(c)	14
49 U.S.C. § 10901	10
49 U.S.C. § 10907	14

Cited Authorities

	Page
49 U.S.C. § 11301	11
49 U.S.C. § 11321	11
49 U.S.C. § 11701	9
49 U.S.C. § 11701(b)	9
49 U.S.C. § 11702	9
49 U.S.C. § 11703	10
49 U.S.C. § 11704	10
49 U.S.C. § 11705	10
49 U.S.C. § 11706	10
49 U.S.C. § 11707	10
49 U.S.C. § 20101	12, 13
49 U.S.C. §§ 10101-10102	9
49 U.S.C. §§ 10501-10502	9
49 U.S.C. §§ 10701-10747	9
49 U.S.C. §§ 10901-10908	9

Cited Authorities

	Page
49 U.S.C. §§ 11101-11164	9
49 U.S.C. §§ 11301-11328	9
49 U.S.C. §§ 11323-11325	3, 11
49 U.S.C. §§ 11501-11502	9, 10
49 U.S.C. §§ 11701-11707	9
49 U.S.C. §§ 11901-11908	9
P.L. 95-473. 92 Stat. 1359	14
P.L. 95-473. 92 Stat. 1407	14
Other Authorities:	
H.R. Rep. No. 104-311 (1995), *reprinted in* 1995 U.S.C.C.A.N. 807	16
H.R. Conf. Rep. No. 104-422 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793	17
N.J.A.C. 5:23-1.1 *et seq.*	10
N.J.A.C. 5:23-1.18	10

INTEREST OF *AMICI CURIAE*

The New Jersey State League of Municipalities (the "League") is a voluntary association which provides advocacy, education and support for municipalities in the State of New Jersey.[1] More than 560 municipalities are members of the League. It tracks legislation affecting municipalities and comments on local impacts. It intervenes, on behalf of its members, in selected cases pending in federal and state courts.

Because of its vigilance on behalf of its New Jersey members, the League is particularly well situated to comment on the effect of legislation and court rulings that affect the historic "police powers" of municipalities. The ability of municipalities to regulate in the interest of public health, safety and welfare is basic to the proper functioning of local government in New Jersey and throughout the United States.

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization that has provided services and programs to local government lawyers since 1935. With a membership of more than 1500, IMLA is the oldest and largest association of attorneys that represent local government.

Since its establishment, IMLA has served its membership by being an advocate for the interests, positions and views of local governments involved in cases pending in the United States Supreme Court, in federal circuit courts and in state appellate

1. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae*, its member, or counsel have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

and supreme courts, that present legal issues that may have a significant impact on a substantial number of governments across the United States.

IMLA is also uniquely situated to comment on a case that has a possibility of sweeping away important police power regulations of states and municipalities as they apply to railroads.

The League and IMLA submit this brief in support of the Petition for a Writ of Certiorari by the City of Auburn because the interpretation by the Ninth Circuit of the Interstate Commerce Commission Termination Act ("ICCTA") absolutely preempts the applicability of local building, environmental and other police powers to railroads.

SUMMARY OF ARGUMENT

The language of the ICCTA is not clear and unambiguous as to preemption by Congress of all State police powers with respect to railroads. The language of the preemption sections of the ICCTA, when read *in pari materia* with other provisions of the ICCTA, reveal a Congressional intent to preempt only local regulations related to the primary economic regulatory function of the Surface Transportation Board ("STB").

The full title of the act and the statutory history of the ICCTA evidence a Congressional intent not to preempt the exercise by the states of their police powers except as those police powers relate to traditional economic regulation of railroads. The jurisdiction of the STB over railroads is exclusive only as the economic matters covered by the ICCTA. When a matter is not the subject of review by the STB, State regulation is not preempted.

The Ninth Circuit's interpretation of the ICCTA has the effect of rendering a whole host of traditional police powers — such as building, fire safety and sanitary regulations — inapplicable to railroads. There is nothing in the language of the ICCTA, the legislative history of the ICCTA or the history of other railroad regulation or deregulation that suggests that Congress intended to exempt railroads from these types of local regulations. The Court should grant certiorari to dispel the notions contained in the Ninth Circuit opinion below that the ICCTA preemption of state police powers is absolute.

ARGUMENT

I.

THE ICCTA IS NOT CLEAR AND UNAMBIGUOUS AS TO THE INTENT OF CONGRESS TO PREEMPT ALL STATE POLICE POWERS WITH RESPECT TO RAILROADS.

This case began with proceedings before the STB in which the Burlington Northern Santa Fe Corporation, and related companies ("Railroad") sought approval from the STB pursuant to 49 U.S.C. §§ 11323-25 for approval of a transaction (the "Merger") in which the Railroad would reacquire a line, known as the Stampede Pass Line, (which it or its predecessors formerly owned), and convert the rail line from one carrying local traffic to one providing through main line service between eastern and western Washington.

In connection with the Merger, the STB, acting pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, conducted an environmental assessment as to operational matters, focusing primarily on the effects of the

increase in train traffic on the entire Stampede Line. (Appendix D at page 71a).

As part of the upgrade of the rail line affected by the Merger, the Railroad intended to engage in certain construction activities. These included the replacement of track sidings, replacement of maintenance of way buildings and snow sheds, improvement of the Stampede Pass tunnels and installation of communications towers. (Appendix B at 24a). No environmental assessment of these activities was conducted because the STB found that these activities did not require STB approval under the ICCTA. (Appendix D at 71a).

The Railroad originally made application to the local jurisdictions for permits for the construction activities but withdrew them after the Secretary of the STB had given an informal opinion, in response to a request by King County, that the ICCTA had preempted the ability of the municipalities to apply their police power regulations to the construction activities. King County, and later Auburn, applied for a formal ruling by the STB. The STB ruling on the Auburn petition was appealed to the Ninth Circuit.

The STB ruling recognized that preemption does not withdraw from the states "the power to regulate where the activity regulated [is] merely a peripheral concern" of federal law. (Appendix C at 49a). It also recognized that where state or local law can be applied without interfering with the federal law, the courts have done so. (Appendix C at 50a). However, without examining the ordinances at issue, the STB found that "it appears that requiring a permit for BNRR's operations or maintenance and upgrading plans for the Stampede Pass line would go too far." (Appendix C at 50a).

On Auburn's appeal to the Ninth Circuit, the Court took a much broader view than did the STB of the preemption provisions of the ICCTA and held:

> We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of ICCTA and the statutory framework surrounding it. (Appendix A at 17a).

The League and IMLA would not be filing this brief had the Ninth Circuit properly applied the principles of this Court's decision in *Medtronic v. Lohr*, 518 U.S. 470, 486, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). This case would not have had the significance that it does to these *amici* if the construction details had been properly before the STB and the Court had found that specific local building and environmental regulations had been preempted. However, the construction details of the upgrade were never before the STB under the ICCTA. The environmental review conducted by the STB was limited to the considerations necessary to approve the Merger and did not deal with the consequences of construction. No attempt was made to harmonize the ordinances of Auburn and King County with the environmental assessment conducted by the STB pursuant to the Railroad's request for approval of the Merger.

The effect of the rulings of the STB and the Ninth Circuit, therefore, is that local regulations are preempted even when there is no need for STB approval of a railroad activity under the ICCTA. This effect is much wider than Congress intended and is needlessly detrimental to legitimate and proper police power regulations by states and municipalities.

Because of the holding in this case, a railroad in New Jersey has been arguing that it is no longer obligated to allow inspection of its sanitary, electrical and other facilities in offices located in boxcars that are permanently affixed to a railroad track and used in connection with a new locomotive refueling facility. Those facilities did not require a certificate of authority from the STB under any of its statutorily specified ICCTA remedies. Yet the New Jersey Superior Court Appellate Division has held that the ICCTA vests primary jurisdiction for implementation of such fundamental public health and safety police power remedies in the STB. *Village of Ridgefield Park v. New York Susquehanna and Western Railway*, 318 N.J. Super 385, 72 A.2d 267 (App. Div. 1999). A petition for certification to the New Jersey Supreme Court has been filed and remains pending in that Court.

On the other hand, prior to the Ninth Circuit decision in this case, a New Jersey Superior Court, Law Division judge had quite properly held that a railroad facility for off-loading liquid food product from railroad tanker cars could be reviewed by local land use agencies on an application for site plan approval under the New Jersey Municipal Land Use Law. The Court there held that it would be an unreasonable restraint on interstate commerce and, therefore unlawful under the ICCTA preemption, for the local land use agencies to deny a site plan approval and thereby prevent the construction of the facility. However, the Court found no reason why, under the ICCTA, a railroad could not be required to submit an application and to attempt to accommodate its facility to the local, legitimate police power concerns of the municipality. *Borough of Riverdale v. New York Susquehanna and Western Railway Corp.*, New Jersey, Law Division, Morris County, not officially reported, Docket No. MRS-L-2297-96 (decided August 7, 1996).

The opinion of Justice Stevens in the *Medtronic* supra case sets forth some elemental principles applied by this Court in judging preemption cases. That opinion says:

> . . . Although our analysis of the scope of the preemption statute must begin with its text, [citation omitted] our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of preemption. [citation omitted]
>
> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action. In all preemption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," [citation omitted] we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."
>
> * * *
>
> . . . [S]econd, our analysis of the scope of the statute's preemption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963), that "[t]he purpose of Congress is the ultimate touchstone" in every preemption case. [citation omitted] As a result, any understanding of the scope of a preemption statute must rest primarily on "a fair understanding of *congressional purpose*." [citations omitted] Congress' intent, of course, primarily is

> discerned from the language of the preemption statute and the "statutory framework" surrounding it. [*Medtronic*, supra 518 U.S. at 484-486, 116 S. Ct. at 2250-2251 emphasis in the Original]

Justice Breyer concurring in part and concurring in the judgment of the Court, joined in the foregoing language and found the preemption statute in the *Medtronic* case to be ambiguous. 581 U.S. at 503-508, 116 S. Ct. at 2259-2262.

Applying those principles to this case, *amici* respectfully submit that the words of preemption sections of the ICCTA are ambiguous and cannot be construed as sweeping away all State police powers, particularly when those matters are not the subject of an STB application.

Section 10501(b) says:

> 10501(b) The jurisdiction of the Board over —
>
> (1) transportation by rail carriers, *and the remedies provided in this part* with respect to rates, classifications, rules (including car service, interchange and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located entirely in one State, is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to the regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law. [49 U.S.C. § 10501(b), emphasis supplied].

To properly understand Congressional intention, it is necessary to examine what is meant by the phrase "remedies provided under this part with respect to the regulation of rail transportation." To do that, it is necessary to look to the context of the statute.

When it used the word "part" in Section 10501, Congress was referring to Part A entitled "Rail" of Subtitle IV entitled "Interstate Transportation" of Title 49 entitled "Transportation" of the United States Code. Part A — the "part" referred to in Section 10501 — consists of nine chapters entitled "General Provisions" (49 U.S.C. §§ 10101-10102); "Jurisdiction" (49 U.S.C. §§ 10501-10502); "Rates" (49 U.S.C. §§ 10701-10747); "Licensing" (49 U.S.C. §§ 10901-10907); "Operations" (49 U.S.C. §§ 11101-11164); "Finance" (49 U.S.C. §§ 11301-11328); "Federal-State Relations" (49 U.S.C. §§ 11501-11502); "Enforcement, Investigations, Rights and Remedies" (49 U.S.C. §§ 11701-11707); and "Civil and Criminal Penalties" (49 U.S.C. §§ 11901-11908).

The "remedies" found in this part deal exclusively with the economic regulation of railroads. For example, the chapter on rate-making says that railroad routes and rates must be reasonable. The procedure for determination of whether a railroad is complying with the law in this regard is set forth in 49 U.S.C. § 11701 which says that "if the Board finds that a rail carrier is *violating this part*, the Board shall take appropriate action to compel compliance . . ." A person, including a governmental authority may file a complaint "*about a violation of this part*" under 49 U.S.C. § 11701(b). The Board has the authority to bring a civil action to compel very specific actions on the part of railroads. 49 U.S.C. § 11702. The Attorney General has the authority to bring court proceedings or civil actions to prosecute persons "*violating this part*" or to compel "*compliance*

with this part" 49 U.S.C. § 11703. The rights and remedies of persons injured by rail carriers are governed by 49 U.S.C. § 11704. Statutes of limitations dealing with actions to recover overcharges are specified in 49 U.S.C. § 11705. 49 U.S.C. § 11706 deals with the liability of rail carriers under receipts and bills of lading. Section 11707 deals with the liability when property is delivered in violation of routing instructions, 49 U.S.C. § 11707.

The Chapter on Federal-State relations deals only with the proper method of taxation of railroad properties by the States. 49 U.S.C. §§ 11501-11502.

In connection with the construction of railroad lines, the Board has the authority to issue certificates of authority with respect to an extension of existing railroad lines or to the construction of new lines. 49 U.S.C. § 10901. It has the authority to regulate the construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if located in only one State. 49 U.S.C. § 10501.

However, nowhere in "this part" are there regulations similar to those found in broadly applicable, noneconomic police power regulations enacted by most States. For example, New Jersey has a Uniform Construction Code, N.J.A.C. 5:23-1.1 *et seq.* which governs the construction standards for all buildings, including those owned by railroads. The Code provides for periodic inspections of footings and foundations, sanitary systems, electrical systems and the like. N.J.A.C. 5:23-1.18. These are not "remedies provided under this part" which are preempted by Section 10501(b). It would be absurd to think that Congress intended the STB to promulgate regulations similar to the Uniform Construction Code for railroad facilities. Would

the STB staff perform building inspection functions? It would be equally unthinkable that Congress would have otherwise left these very important protections of public health and safety unregulated simply because a railroad was involved. Congress must have intended that the preemption decreed by the ICCTA would be applicable only to the types of regulation that were expressly covered in "this part" of the ICCTA.

Likewise, a more narrow construction of 49 U.S.C. §§ 11323-11325 is mandated when the context of those sections is considered. Chapter 113 deals with "Finance" of railroads. Subchapter I (49 U.S.C. § 11301) deals with perfecting security interests in railroad cars and other equipment. Subchapter II deals with "Combinations" and, generally gives the STB the power to review and approve or exempt various transactions (such as mergers or other combinations) involving railroads. Section 11321, relied upon by the Ninth Circuit has a sentence which, quoted in its entirety, says:

> A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation or person carry out the transaction, hold, maintain and operate property, and exercise control or franchises acquired through the transaction. (49 U.S.C. § 11321).

Again, this section is ambiguous at best. Does it mean that simply because there has been an approved or exempted merger, a railroad is exempted from obtaining a certificate of occupancy for its facilities if one is required by local law? Or that a railroad involved in a merger is no longer required to clear snow from its sidewalks if required by municipal ordinance? The section

was meant to apply only to those laws that are necessary to allow the combination to proceed; not to all police power regulations.

The final ambiguity is found in the last clause of the preemption sentence which preempts "the remedies provided under Federal or State law." If the Ninth Circuit rationale is to be logically applied, Federal as well as State law is to be preempted. As Auburn suggests, railroads would therefore not be subject to the Clean Water Act (33 U.S.C. § 1251), the Endangered Species Act (16 U.S.C. § 1531), the National Environmental Policy Act (42 U.S.C. § 4321) or the Clean Air Act (42 U.S.C. § 7401). In fact, read literally, the Federal Railroad Safety Act (49 U.S.C. § 20101) which consciously transferred safety regulations from the ICC to the Department of Transportation would be preempted by the ICCTA. Such an anomalous result could not have been within the contemplation of Congress.

Far from being "explicit" as to the preemption, therefore, as the Ninth Circuit held, the Court and the STB had an obligation to look beyond to the legislative history to find the intent of Congress. *Medtronic, supra.*

II.

THE LEGISLATIVE HISTORY OF THE ICCTA MANDATES A FINDING THAT CONGRESS DID NOT INTEND TO SWEEP AWAY LOCAL POLICE POWERS AS THEY APPLY TO RAILROADS.

When a statute is ambiguous the Court may look to various aids to help in the interpretation. One is the title of the Act. *I.N.S. v. National Center for Immigrants' Rights,* 502 U.S. 183, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991). Another is the legislative history.

The full title of the ICCTA when it was enacted by Congress was

> An Act to abolish the Interstate Commerce Commission, to amend Subtitle IV of Title 49, United States Code, to reform *economic regulation* of transportation, and for other purposes. (Emphasis supplied).

This clear statement of the intent of Congress in enacting the legislation belies the holding of the Ninth Circuit that the ICCTA was intended to reform anything other than economic regulation.

Until the adoption of the ICCTA, the States had certain economic regulatory powers with respect to railroads. See for example, *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D.Mt. 1997) which described the system of economic regulation of railroads that had been in place in Montana since 1870. *See also Illinois Commerce Commission v. I.C.C.*, 879 F.2d 917 (D.C. Cir. 1989) holding that under the Staggers Rail Act of 1980, the State regulatory authorities continued their jurisdiction over the abandonment of intrastate rail spurs.

Even after the adoption of ICCTA, the States retain certain regulatory powers with respect to the safety of railroad operations. See *CSX Transp., Inc. v. City of Plymouth, Mich.*, 86 F.3d 626 (6th Cir. 1996) recognizing that under the Federal Railway Safety Act (49 U.S.C. § 20101) there was the possibility of State regulation of railroad speed limits and other safety matters but striking down particular municipal regulations.

As part of a prior deregulation measure adopted in 1978, Congress enacted a predecessor to the present Section 10501.

That statute defined the powers of the ICC in Paragraph (a); defined the limitations of the ICC in Paragraph (b); and said in Paragraph (c):

> This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle. [P.L. 95-473. 92 Stat. 1359.]

That Act also contained, as its Section 10907 the following language:

> (b) The Commission does not have authority under sections 10901, 10906 of this title over,
>
> (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State.[P.L. 95-473. 92 Stat. 1407.]

When Congress enacted the ICCTA, the limitations on the power of the STB with respect to intrastate railroads in the former paragraphs (b) and (c) of Section 10501 were eliminated. And the ICCTA version of 10501(b) imported the language of Section 10907 to make it clear that spur tracks and the like were now part of the jurisdiction of the STB even if located in only one State. Powers that the States formerly had to regulate the economic aspects of railroads were clearly eliminated by the ICCTA. *See CSX Transp., Inc. v. Georgia Pacific Public Service*

Comm'n., 944 F. Supp. 1573 (N.D. Ga. 1996) (state regulation of railroad agency closings are preempted by the ICCTA). *See also Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D.Mt. 1997) (state regulation of railroad agencies are preempted).

However, those cases involved only economic regulation and do not hold that all police power regulations have been preempted. It was not the intention of Congress to supplant police power regulations except when they affected the specific economic concerns of railroads embodied in Part A of the ICCTA. The text of various Congressional reports so demonstrate.

The first committee report came from the House Committee on Transportation and Infrastructure. Commenting on what was then Section 10103 [and what later became the preemption sentence of Section 10501(b)], the Committee said:

> To reflect the replacement of the Staggers Act system of optional certification of State regulatory agencies to administer *economic* regulation of railroads using Federal standards, this provision is conformed to the bill's direct and general preemption of State jurisdiction over *economic* regulation of railroads. As used in this section, "State or Federal law" is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel. The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal

> standards, as provided in the relevant provisions of the Staggers Rail Act. [H.R. Rep. No. 104-311 (1995), *reprinted in* 1995 U.S.C.C.A.N. 807. Emphasis supplied.]

The same House Committee Report contained the following comment on what was then Section 10301 (and later became the exclusive jurisdiction part of Section 10501(b):

> This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete preemption of State *economic* regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of *economic* regulation of the interstate rail transportation system. *Although States retain the police powers reserved by the Constitution*, the Federal scheme of economic regulation and deregulation is intended address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation. [H.R. Rep. No. 104-311 (1995), *reprinted in* 1995 U.S.C.C.A.N. 807-808. Emphasis supplied.]

When the bill was adopted by the Conference Committee, Section 10301 — the exclusive jurisdiction language — was renumbered as Section 10501. In addition, Section 10103 of the House Bill — the preemption sentence — was amended by the insertion of the words "with respect to the regulation of rail transportation." What was formerly Section 10103 was inserted into Section 10501(b).

The Conference Report explained the change this way:

> Former section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act. *The Conference provision retains this general rule, while clarifying that exclusivity is limited to remedies with respect to rail regulation — not State and Federal law generally.* For example, criminal statutes governing antitrust maters not preempted by this Act, and laws defining criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of *economic* regulation (and deregulation) of rail transportation. [H.R.Conf. Rep. No. 104-422 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793. Emphasis supplied].

The clear understanding of Congress based upon this Legislative history was that the jurisdiction of the STB would be exclusive with respect to economic regulation. There remains room for regulation by the States on matters that have only a

peripheral effect on interstate commerce. Many vital police power regulations including construction codes, sanitary codes, fire regulations and even some zoning, land use and environmental requirements do not prohibit the construction of railroad facilities but impose reasonable conditions. The absolute rule of the Ninth Circuit in this case prevents the application of such historic, reasonable state and municipal regulation and flies in the face of Congressional intent.

III.

IMPORTANT QUESTIONS OF FEDERALISM ARE PRESENTED BY THIS CASE. THE COURT OUGHT TO GRANT CERTIORARI TO RETURN BALANCE TO THE RELATIONSHIP BETWEEN RAILROADS AND THE STATES CAUSED BY THE NINTH CIRCUIT MISREADING OF CONGRESSIONAL INTENT.

Local governments are vital cogs in maintaining the quality of life for Americans. Local regulations provide safeguards and protections that are often taken for granted. Because of local regulations, the foundation of a building is designed so that it does not settle and cause unsafe conditions. Walls and other structural elements are designed so that they will not collapse or cause other danger. Elevators are inspected so that the lives of riders are not put in peril. Sufficient sanitary facilities are required to accommodate people in public buildings, including railroad terminals and other facilities, and to prevent disease. Electrical codes prevent fire. Building codes provide adequate access for fire fighters and emergency workers. Earthquake codes not only protect the property of the railroad but the surrounding residents and property owners in the event of a catastrophe. Local governments regulate litter and solid waste disposal for aesthetic and health reasons. It has long been recognized by this Court

that zoning serves the general health, safety and welfare of residents, *Village of Euclid v. Ambler*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 2d 303 (1926), and helps to provide a safe and desirable environment, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541, 39 L. Ed. 797 (1974).

So long as the application of any police power ordinance has only an incidental or peripheral effect on interstate commerce or a Federal scheme of regulation of railroads the power of the State or municipality should not be preempted. *cf. San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243, 79 S. Ct. 773, 778, 3 L. Ed. 2d 775 (1959). A blanket preemption such as that found by the Ninth Circuit destroys the delicate balance between the federal interest in safe, economical and efficient means of transportation and the State interest in safe and desirable communities.

Under the ruling of the Ninth Circuit, a railroad would be permitted to build Grand Central Station or Union Station without bathrooms, a commuter station without parking spaces, or an intermodal facility without adequate means for ingress and egress. None of those facilities are exclusively subject to the remedies of the ICCTA any more than the snow sheds and communication towers of the Railroad were here.

By granting the Petition for Certiorari in this case, the Court can confirm that the preemption imposed by the ICCTA is not absolute and that the States, as well as the United States, continue to have power to regulate railroad activities so long as there is no undue interference with interstate commerce.

Here, the STB erred by not examining the specific ordinances in question to determine whether the permit regulations here imposed more than a peripheral burden on

interstate commerce. The Board simply drew the conclusion that because Auburn and King County sought to compel the railroad to get permits, the regulations had "gone too far." The Ninth Circuit erred by misconstruing the ambiguous words of the ICCTA. Certiorari is necessary to correct these errors and to guide States and municipalities about the extent of their remaining powers to regulate railroad construction.

CONCLUSION

The League and IMLA urge the Court to grant the petition of the City of Auburn for a Writ of Certiorari.

Respectfully submitted,

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